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95-1615

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

VINCENT R. TAMBURELLO,

Petitioner,

vs.

COMM-TRACT CORPORATION, JOHN F. POLMONARI, EDWARD MENARD and STEVEN DICKIE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Must individual defendant racketeers, against whom a United States Court found that viable Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, substantive and conspiracy civil actions lie, be totally absolved from civil liability because the racketeering predicate acts committed by them may have arguably also constituted unfair labor practices under the National Labor Relations Act (NLRA), 29 U.S.C. § 158?

II. When interpretation of the applicable Collective Bargaining Agreement is not necessary in order for a United States Court to determine whether a plaintiff has set forth a viable *state* Civil Rights Act claim, are the defendants who might have otherwise been liable under such Act similarly absolved from liability because their conduct may have arguably also constituted unfair labor practices under the NLRA?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

Vincent R. Tamburello was the Plaintiff-Appellant in the United States Court of Appeals for the First Circuit.

Comm-Tract Corporation, John F. Polmonari, Edward Mendar, and Steven Dickie were the Defendants, Appellees in the United States Court of Appeals for the First Circuit.

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STATEMENT OF JURISDICTION

(i) The Judgment of the United States Court of Appeals for the First Circuit sought to be reviewed by this Court issued on October 2, 1995.

(ii) No rehearings of any sort were requested by Petitioner herein.

(iii) At this stage, no cross-petitions exist.

(iv) Jurisdiction of this Court is conferred by 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Article VI[2] :

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary not withstanding.

Pursuant to Supreme Court Rule 14.1.(f), the following statutes are set forth verbatim in the Appendix:

> 18 U.S.C. § 1961; 18 U.S.C. § 1962; 29 U.S.C. § 157; 29 U.S.C. § 158; Massachusetts Civil Rights Act, Massachusetts General Laws chapter 12 sections 11H and 11I.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance (U.S.D.C., D. Mass.) was federal question pursuant to 28 U.S.C. § 1331. Jurisdiction of the state claims was conferred by 28 U.S.C. § 1367 and/or by the doctrine of pendent jurisdiction.

The Petitioner, Vincent R. Tamburello was employed by the Respondent, Comm-Tract Corporation from April 1988 to May 10, 1993. Tamburello, as were all other members of his bargaining unit, was under the terms of a Collective Bargaining Agreement between his Union, the Communications Workers of America, AFL-CIO, Local 4340, and Comm-Tract. During the course of Tamburello's tenure with Comm-Tract, he has occasion to become the Union Steward. Immediately after becoming Union Steward however, the individual racketeer defendants and Respondents herein, John Polmonari, Edward Menard, and Steven Dickie, commenced a pattern of Hobbs Act, 18 U.S.C. § 1951, threats, extortion, harassment, and intimidation of Tamburello in retaliation for Tamburello having assumed the said Steward's position. Polmonari was the President of Comm-Tract, and Menard and Dickie were both Comm-Tract Managers.

The Hobbs Act extortion alleged by Tamburello by the said individual Respondents included: reassignment of Tamburello from favorable jobs to highly unfavorable jobs; replacing Tamburello constantly with workers who were far less skilled

than he; giving Tamburello menial job assignments; withholding pertinent records from Tamburello; switching Tamburello from job assignments to insure that he worked no overtime; threatening and intimidating Tamburello with acts of force for his assertion of Union rights; forcing Tamburello to take vacations at improper times; taking Tamburello's company vehicle away; and, generally, doing a multitude of acts designed to force Tamburello to give up his employment.

Individual Petitioners were ultimately successful in their above said efforts, and Tamburello was forced to resign from his employment with Comm-Tract in May 1993.

In September 1993, Tamburello filed suit in the United States District Court for the District of Massachusetts. Tamburello claimed therein violations of substantive RICO, 18 U.S.C. § 1962(c), RICO Conspiracy, 18 U.S.C. § 1962(d), and also state law torts and civil rights breaches against the individual Respondents. Tamburello further claimed that Comm-Tract had breached the Collective Bargaining Agreement. In tandem with the said Contract claim against Comm-Tract, Tamburello alleged that his Union had breached its Duty of Fair Representation owed to him by treating him arbitrarily, discriminatorily, and in bad faith with regard to the situation. After an initial motion to dismiss for failure to state a claim by all Respondents, Tamburello amended his complaint as a matter of course pursuant to Federal Rule of Civil Procedure 15. All Respondents again moved to dismiss, and the District Court took the matter under advisement.

The District Court, on February 17, 1995, issued its Memorandum of Decision. The court found that "the complaint sets forth the requisite participation in an ongoing criminal enterprise and predicate acts . . . under the Hobbs Act, 18 U.S.C. 1951 (1988) (prohibiting the taking of property by force,

violence, or fear)." Appendix at 20a. This finding however forced the court to consider the issue of "preemption" of RICO by the NLRA. In so doing,, the District Court further held that Tamburello's RICO claims against the individuals were "preempted" by the NLRA. The court went on the rule that all Tamburello's state law claims were similarly preempted by the NLRA.

On March 16, 1995, Tamburello filed his notice of appeal to the United States Court of Appeals for the First Circuit. After argument, the Circuit Court issued its opinion on October 2, 1995, which opinion affirmed the District Court in all respects.

Tamburello filed this Petition on January 2, 1996, pursuant to Supreme Court Rules 13.1. and 30.1.

REASONS FOR GRANTING THE WRIT

I.

The United States Court of Appeals for the First Circuit's Decision below with regard to **Question I** is in conflict with decisions of other United States Courts of Appeal on the same matter. Furthermore, the said decision of the United States Court of Appeals for the First Circuit regards an important question of federal law — RICO "preemption" by the NLRA — which has not been, but should be, settled by this Honorable Court, and the said decision is in conflict with applicable decisions of this Honorable Court.

The First Circuit held that Tamburello's RICO claims — although otherwise valid — were "preempted" by the NLRA. 67 F.3d 973 at 976-980. *See* Appendix at 4a-13a. Although the Supreme Court has never squarely addressed this issue — namely, whether RICO, a federal criminal statute with an express

civil remedy, can be gutted by another federal statute, the NLRA — several United States Circuit Courts of Appeals have. Contrary to the First Circuit's holding in *Tamburello*, some of the said appeals courts have held that the NLRA does not "preempt" RICO, and, moreover, that the constitutional doctrine of preemption obviously deals with federal/state conflicts rather than with federal/federal conflicts of applicable law. *See United States v. Thordarson*, 646 F.2d 1323, 1330 (9th Cir. 1981) (Argument that federal regulation of labor union activities through comprehensive scheme of predominantly civil remedies evidences a congressional intent to exempt labor violence from federal criminal prosecution is **without** merit. Even in a civil sense, "to the extent that the federal labor laws do reach union violence to achieve collective bargaining objectives, it is clear that they do not provide the exclusive remedy for such violence." *Id.* at 1331 citing cases. RICO indictment dismissal on NLRA grounds reversed.); *United States v. Boffa*, 688 F.2d 919, 931-32 (3d Cir. 1982) ("Assuming without deciding that appellants' conduct is at least arguably prohibited by Section 8 of the NLRA, we decline to accept the proposition that the NLRA precludes the enforcement of a federal statute [RICO] that independently proscribes that conduct as well.") Moreover, the *Boffa* court held the obvious, namely, that no constitutional concerns — like preemption — are present when a federal criminal statute is said to impinge on the NLRA. *Id.* at 932, and that "legislative history suggests that Congress did not intend the NLRA to displace **state or federal** laws relating to fraud or violence." *Id.* at 932 (bolding added); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 747 (10th Cir. 1980) (conspiracy claims sounding under 42 U.S.C. § 1985 not within exclusive jurisdiction of NLRB); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) (Title VII action for race discrimination unaffected by whether employees have available to them NLRA protections); *but see Brennan v. Chestnut*, 973 F.2d 644 (8th Cir. 1992) (NLRA preempts RICO if activity complained of involves conduct

protected and prohibited by the NLRA.); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 662 (7th Cir. 1992) (RICO "preempted" by NLRA if underlying conduct wrongful only by resort to labor laws). Suffice it that there is a substantial conflict among the Circuits as to Question I.

In addition to holding as above noted, the First Circuit also made light of the fact that Tamburello claimed a violation of the Union's Duty of Fair Representation. This alone — even if the First Circuit's core holding was correct, which it was not — takes the NLRA out of the equation. Namely, as set forth in the cases of *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Breininger v. Sheet Metal Workers International Association Local Union No. 6*, 493 U.S. 67 (1989), this High Court has clearly held that when a breach of the Union's Duty of Fair Representation (DFR) is alleged, federal concerns for uniform application of labor policy are not implicated, and, therefore, resort to the federal courts in such instances is proper and the NLRA therefore is no impediment to same. Since Tamburello also adequately alleged such breach of the Union's DFR, "preemption" was additionally improper.

II.

The United States Court of Appeals for the First Circuit's opinion below with regard to **Question II** regards an important question of federal law — preemption, pursuant to Article VI of the United States Constitution, of a state civil rights statute — and the said decision is in conflict with applicable decisions of this Court.

The Massachusetts Civil Rights Act, *see* Appendix at 42a-43a proscribes interference with federal or state rights through threats, intimidation, or coercion. It is in essence a state version of the Hobbs Act, but with an express civil remedy. As set forth above, preemption of this state law statutory remedy was equally

flawed, because the claims could be resolved without resort to interpretation of the Collective Bargaining Agreement, *see generally, San Diego Building Trades Council v. Garmon*, 79 U.S. 773 (1959) and because, again, a breach of the Union's DRF was properly alleged.

CONCLUSION

For the foregoing reasons, the United States Court of Appeals for the First Circuit should be reversed, and Tamburello's action should respectfully be remanded to the District Court for further proceedings.

Respectfully submitted,

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APPENDIX A — JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED OCTOBER 2, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1295

VINCENT R. TAMBURELLO,

Plaintiff-Appellant,

v.

COMM-TRACT CORPORATION, JOHN F. POLMONARI, EDWARD MENARD, AND STEVEN DICKIE,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, *U.S. District Judge*]

Before

Torruella, *Chief Judge*,

Lynch, *Circuit Judge*,

and Casellas,* *District Judge*.

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* Of the District of Puerto Rico, sitting by designation.

Appendix A

Matthew Cobb, with whom *Law Office of Matthew Cobb*, was on brief for appellant.

Timothy P. Van Deck with whom *Joshua L. Ditelberg* and *Edwards & Angell*, were on brief for appellees.

October 2, 1995

TORRUELLA, *Chief Judge*. Vincent Tamburello (Tamburello) appeals the dismissal of his complaint against his employer, Comm-Tract Corporation (Comm-Tract), and several individuals who were his supervisors at Comm-Tract. Tamburello alleges that his supervisors engaged in a course of harassment in retaliation for his union activities as a union steward, and seeks damages under, *inter alia*, the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1988), and the Massachusetts Civil Rights Act (MCRA), Mass. Gen. L. ch. 12, § 11I (1988). The district court found that Tamburello's claims are preempted by the National Labor Relations Act, as amended, 29 U.S.C. §§ 151-16 (1988) (NLRA), and therefore dismissed his complaint for failure to state a claim upon which relief may be granted, Fed. R. Civ. P. 12(b)(6). We affirm.

BACKGROUND

We review the dismissal *de novo*, considering only those facts alleged in the complaint, and drawing all reasonable inferences therefrom. *Lesser v. Little*, 857 F.2d 866, 867 (1st Cir. 1988). We will affirm the dismissal "only if it appears beyond doubt that [Tamburello] can prove no set of facts which would entitle him to relief." *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Appendix A

In July 1991, Tamburello became a union steward at Comm-Tract. He alleges that soon afterwards the individual defendants — the president, general manager, and manager of Comm-Tract — began harassing, threatening and intimidating him. Specifically, Tamburello alleges that they pulled him off favorable jobs, replacing him with less skilled workers; gave him menial job assignments; withheld his personnel file from him; took him off jobs to deny him overtime pay; made him take a forced vacation or face termination; took away his company vehicle; and made threatening anti-union statements. Tamburello alleges that these actions "were solely to harass, embarrass, coerce, and intimidate [him] into giving up his Steward position with the Union." As a result of this intimidation, Tamburello resigned his position with Comm-Tract in May 1993, and subsequently instituted this action.

DISCUSSION

Count I of Tamburello's complaint alleges that the individual defendants conducted the affairs of an enterprise, Comm-Tract, through a pattern of Hobbs Act extortion of Tamburello's property rights, in violation of RICO, 18 U.S.C. § 1962(c). Count II alleges that the individual defendants conspired to violate RICO by knowingly joining the enterprise and by committing, or agreeing to commit at least two acts of racketeering. Count IV alleges that all defendants violated Tamburello's rights under the MCRA.[1] We address the RICO claims first.

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1. Tamburello does not appeal the district court's dismissal of Counts III and V.

Appendix A

I. *The RICO Claims*

Tamburello alleges that the actions of his supervisors at Comm-Tract constituted a pattern of extortion to deprive him of his rights to speak out on union matters, his rights under the collective-bargaining agreement, and his right to his job. The district court held that Tamburello's RICO claims are preempted by the NLRA, which "pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 276 (1971) (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).

The NLRA "is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce." *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 238 (1967). The NLRA reflects congressional intent to create a uniform, nationwide body of labor law interpreted by a centralized expert agency — the National Labor Relations Board (NLRB). Accordingly, the NLRA vests the NLRB with primary jurisdiction over unfair labor practices. *See* 29 U.S.C. § 158. Applying these principles, the *Garmon* Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of she National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245. The Court has interpreted this to mean that, "as a general rule, neither state nor federal courts *have jurisdiction* over suits directly involving 'activity [which] is arguably subject to § 7 or § 8 of the Act.'" *Vaca v. Sipes*, 386 U.S. 171, (1967) (emphasis added; and quoting *Garmon*, 359 U.S. at 245). *See also*

Morgan v. Massachusetts General Hosp., 901 F.2d 186, 194 (1st Cir. 1990) ("as a general rule, the [NLRB] has 'exclusive jurisdiction to fine, prevent, and rectify unfair labor practices' ") (quoting *New Mexico Dist. Council of Carpenters, AFL-CIO v. Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981); and collecting cases)). A primary justification of the preemption doctrine is "the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose. . . ." *Vaca*, 386 U.S. at 180-81.[2]

The alleged wrongful conduct in this case is arguably prohibited by the NLRA. Section 8(a)(3) of the NLRA makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). The ultimate question presented by Tamburello's claims is whether his supervisors at Comm-Tract intimidated, coerced,

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2. Although the *Garmon* doctrine, which is rooted in the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, was originally concerned only with federal supremacy over conflicting *state* laws, it has been extended to cover the relationship between the NLRA and other federal statutes. *See Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 626 (1974); *Morgan*, 901 F.2d at 194; *New Bedford Fishermen's Welf. Fund v. Baltic Ent.*, 813 F.2d 503, 504-05 (1st Cir. 1987). *But see United States v. Boffa*, 688 F.2d 919, 931-33 (3d Cir. 1982) (concluding that *Garmon* does not apply to conflicts between the NLRA any federal statutes), *cert. denied*, 460 U.S. 1022 (1983). Because the NLRA's relationship with a state statute implicates the Supremacy Clause, and its relationship with a federal statute does not, some courts hold that the analysis in the former situation should be stricter than in the latter. *See Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441, 1446-47 (5th Cir. 1992); *Boffa*, 688 F.2d at 931-33. The facts of this case are such that we need not at this time decide whether, or to what extent, we agree with this proposition.

threatened, and harassed him into quitting his job in retaliation for his union activities as a union steward. It is beyond dispute that these allegations, if found to be true, would constitute a violation of the NLRA. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1983) (an employer violates § 8(a) (3) "when, for the purposes of discouraging union activity, . . . it purposefully creates working conditions so intolerable that the employee has no option but to resign").[3] Unless an exception applies, therefore, Tamburello's RICO claims are subject to the NLRB's primary jurisdiction.

There are three generally recognized exceptions to the NLRB's primary jurisdiction. The first is where Congress has expressly carved out an exception to the NLRB's primary jurisdiction. *Vaca*, 386 U.S. at 179-80 (citing cases); *Brennan v. Chestnut*, 973 F.2d 644, 646 (8th Cir. 1992). Congress has not made an exception to the NLRB's primary jurisdiction for claims alleging extortion. Indeed, the only labor-related "racketeering" activity expressly listed as predicates to liability under RICO are actions concerning restrictions of payments and loans to labor organizations, or those relating to embezzlement from labor funds. *See* 18 U.S.C. § 1961(1)(C); 29 U.S.C. §§ 186, 501(c). The specific exceptions carved out in §§ 186 and 501(c) support the conclusion that Congress

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3. Tamburello's claims are also arguably subject to § 8(a)(1) of the NLRA, which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7 of the NLRA]." 29 U.S.C. § 158(a)(1). Section 7 provides, in pertinent part, that employees shall have the right to "self-organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157.

intended that "violations of labor laws other than § 186 [or § 501(c)] alleged as predicate acts are preempted." *Brennan*, 973 F.2d at 647 (citing *Butchers' Union, Local No. 498 v. SDC Inv. Inc.*, 631 F. Supp. 1001 (E.D.Cal. 1986)). This exception therefore does not apply.

The second exception applies when the regulated activity touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction," courts "could not infer that Congress had deprived the States of the power to act." *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 195 (1977) (quoting *Garmon* 359 U.S. at 244). This exception is inapplicable to plaintiff's RICO claims because they involve the relationship between two federal laws, as opposed to a state and a federal law.

The third exception holds that the NLRB's exclusive jurisdiction does not apply if the regulated activity is merely a peripheral or collateral concern of the labor laws. *Vaca*, 386 U.S. at 179-80; *Brennan*, 973 F.2d at 646. Under this exception, federal courts may decide labor questions that emerge as collateral issues in suits brought under statutes providing for independent federal remedies. *Connell Construction*, 421 U.S. at 626; *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441, 1446 (5th Cir. 1992).

Plaintiff's allegations arguably establish violations of both RICO and the NLRA — extortion on the one hand, and unfair labor practices on the other. We must determine whether the issues raised by Tamburello's potential unfair labor practice claims are merely collateral to the issues raised by his RICO extortion claims. In making this determination, several federal courts take the position that courts must defer to the

primary jurisdiction of the NLRB if the underlying conduct of the RICO claim is wrongful only by virtue of, or reference to, the labor laws. *See Brennan*, 973 F.2d at 646; *Talbot*, 961 F.2d at 662; *Mann v. Air Line Pilots Assoc.*, 848 F. Supp. 990, 993 (S.D.Fla. 1994); *McDonough v. Gencorp, Inc.*, 750 F. Supp. 368, 370 (S.D.Ill. 1990). One federal court has framed the issue as follows:

> RICO should be read as limited by the exclusive jurisdiction of the NLRA only when the Court would be forced to determine whether some portion of the defendant's conduct violated labor law before a RICO predicate act would be established. So long as the predicate act exists independent of any unfair labor practice resolutions, the NLRB's exclusive jurisdiction is not violated since the Court will not be forced to interpret labor law except as a collateral matter. However, if the existence of the predicate acts depends wholly upon a determination that a violation of federal labor law occurred, jurisdiction is preempted.

MHC v. Intern. Union, United Mine Wkrs. of Am., 685 F. Supp. 1370, 1376-77 (E.D.Ky. 1988). Similarly, we have held, in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., that the NLRA is the exclusive remedy for claims "which hinge on an unfair labor practice having occurred." *Morgan*, 901 F.2d at 194.

Like Tamburello, the plaintiff in *Brennan* alleged extortion as a predicate RICO act. In holding that the

plaintiff's RICO extortion claim was "preempted (*see supra* n.2) by the NLRA, the Eighth Circuit court noted that 18 U.S.C. § 1951 (1988) is a generic law prohibiting extortion,[4] and reasoned that the court was therefore forced to look to the labor laws to define the alleged illegal conduct. Because the defendant's conduct was illegal, if at all, only by virtue of the NLRA, the court concluded that the NLRB had exclusive jurisdiction to resolve what was, at its essence. an unfair labor practice claim. *See Brennan,* 973 F.2d at 647.

For reasons similar to those expressed in *Brennan,* we conclude that the unfair labor practice issues implicated by Tamburello's complaint are not merely collateral to his RICO claims.[5] Tamburello alleges that his supervisors placed him on

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4. 18 U.S.C. § 1951 provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

RICO defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

5. We note also that, in a general sense, claims alleging employer retaliation for protected union activities are not merely a peripheral concern of the NLRA. As indicated above, the conduct alleged in this case would, if true,

(Cont'd)

the less desirable work assignments, reduced his chances for overtime pay, made him take a forced vacation or face termination, took away his company vehicle, and made threatening anti-union activities, all to coerce him into giving up his union steward position, and, eventually, to resign his position with Comm-Tract. The problem is that none of this alleged conduct is illegal without reference to the NLRA. It is the NLRA that prohibits employers from creating intolerable working conditions to discourage union activities, *see* 29 U.S.C. § 158(a)(3); *Sure-Tan*, 467 U.S. 894, and it is the NLRA that prohibits an employer from interfering with an employee's right to join a union and engage in concerted activities for mutual aid and protection. *See* 29 U.S.C. §§ 158(a)(1), 157. Indeed, one would presume that Congress passed the NLRA, at least in part, precisely because conduct such as that complained of by Tamburello was not theretofore prohibited. We thus agree with the district court's conclusion that "the alleged conduct that led to [Tamburello's] termination of employment is illegal only by reference to union activities."

In order to determine whether plaintiff has established a RICO predicate act, a reviewing court would be forced to decide whether some portion of the defendant's conduct violated the federal labor laws. Because plaintiff's claim hinges upon a determination of whether an unfair labor practice has occurred, we conclude that his RICO claims are subject to the primary jurisdiction of the NLRB .[6]

(Cont'd)

constitute an unfair labor practice under the NLRA. The authority of the NLRB to remedy unfair labor practices is central to its purpose. *NLRB v. State of Illinois Dept. of Employment Security*, 988 F.2d 735, 739 (7th Cir. 1993).

6 . We note that the question of whether a labor law issue is collateral to

(Cont'd)

As a final matter, we will briefly address two additional arguments proffered by the plaintiff. First, Tamburello contends that the NLRA does not apply to his allegations at all because his RICO claims are asserted against the individual defendants, and not the "employer" within the meaning of the NLRA. The NLRA expressly provides, however, that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. § 152(2). The district court's finding that the individual defendants — the president, general manager, and manager of Comm-Tract — acted as the agents of the company is supported by the record, particularly since Tamburello's complaint alleged that the individual defendants controlled Comm-Tract. *See American Press, Inc. v. NLRB*, 833 F.3d 621, 625 (6th Cir. 1987) (the test to be applied is "whether, under all the circumstances, the employees could reasonably believe that an employee was reflecting company policy, and speaking and acting for management") (quoting *Aircraft Plating Co.*, 213 N.L.R.B. 664 (1974)). We therefore reject Tamburello's argument that the NLRA does not apply to his RICO claims.

Second, Tamburello strains to fit his case within the exception to *Garmon* granted suits alleging a breach of the duty of fair representation under § 9(a) of the NLRA. *See Breininger v. Sheet Metal Workers Int'l Assoc. Local Union*

(Cont'd)
issues raised by a claim under another statute is an intensely fact driven inquiry. The focus must be on the particular allegations of the plaintiff's complaint to determine whether any or all of the claims may be resolved without determination of questions of federal labor law. In addition, "[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971).

No. 6, 493 U.S. 67, 74 (1989) (reiterating rule that *Garmon* preemption does not apply to suits alleging a breach of the duty of fair representation) (citing *Vaca*, 386 U.S. at 181). Tamburello did not sue his union directly, but rather brought his fair representation allegations as part of a "hybrid" action under § 301, which provides federal jurisdiction for employees to sue their employer for breach of a collective bargaining agreement, and their union for breach of its duty of fair representation. *See* 29 U.S.C. § 185(a); *Vaca*, 386 U.S. at 186. The *Breininger* Court implied that *Garmon* would not apply to hybrid § 301/fair representation claims because of the important interest of having the same entity adjudicate a joint claim against both the employer and the union. *See Breininger*, 493 U.S. at 80-84. Tamburello argues that the reasoning of *Breininger* applies to him because he brought both a RICO claim and a fair representation claim.

Breininger concerned hybrid actions against the employer for breach of a collective bargaining agreement, and against she union for breach of the duty of fair representation. Tamburello's argument fails because his duty of fair representation claim (Count III) was dismissed by the district court, and is not prosecuted on appeal, and his RICO claims implicate none of the concerns underlying *Breininger* and *Vaca* for exempting fair representation claims from the *Garmon* doctrine. *Vaca* and *Breininger* exempted fair representation claims from the reach of *Garmon* for two related reasons. First, the Court noted that the duty of fair representation has judicially evolved, and that it predated the prohibitions against unfair labor practices. *Breininger*, 493 U.S. at 74-79 (citing *Vaca*, 386 U.S. at 181). Second, noting that fair representation claims often involve matters outside the NLRB's unfair labor practice jurisdiction, the Court

expressed its doubt that the NLRB brought any greater degree of expertise to such claims than courts. *Id.* Because Tamburello has no viable duty of fair representation claim before the court, and his RICO claims do not implicate the concerns underlying *Breininger*, his claims remain subject to the primary jurisdiction of the NLRB.

II. *The State Law Claims*

In Count IV, Tamburello alleges that the conduct of his supervisors violated his rights under the MCRA, Mass. Gen. L. ch. 12 § 11, which provides a remedy for the interference "by threat, intimidation, or coercion" with an individual's "exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth." Mass. Gen. L. ch. 12, § 11I; *Bally v. Northeastern University*, 403 Mass. 713, 717 (1989). As explained above, the alleged conduct of Tamburello's supervisors is arguably subject to § 8(a)(3) of the NLRA, which prohibits an employer from discriminating against an employee on the basis of union status, and also to § 8(a)(1). As with the RICO claim, therefore, the question is whether any of the three exceptions to *Garmon* preemption apply. The first and third exceptions do not[7] we address the second exception below.

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7. The first exception — whether Congress has explicitly carved out an exception to the NLRB's exclusive jurisdiction — is inapplicable to Tamburello's state law claims. With respect to the third exception, we concluded above that the unfair labor practice issues implicated by Tamburello's complaint are not merely collateral to his RICO claims. For the same reasons, they are not merely collateral to his MCRA claims. The third exception therefore does not apply.

Garmon preemption does not apply when the underlying regulated activity touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction," courts "could not infer that Congress had deprived the States of the power to act." *Sears, Roebuck*, 436 U.S. at 195 (quoting *Garmon* 359 U.S. at 244). In cases where, as here, the underlying conduct is arguably *prohibited* by the NLRA, the Court has identified two prerequisites to application of the "local interests" exception. First, the state must have a significant interest in protecting the citizen from the challenged conduct. Second, the controversy which could be presented to the state court must be different from that which could have been presented to the NLRB. *Sears, Roebuck*, 436 U.S. at 196-97. As the Court explained:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

Id. at 197.

Appendix A

We assume, *arguendo*, that the state has a significant interest in protecting an employee from the harassment of his supervisors in retaliation for his union activities. We agree with the district court, however, that "Plaintiff's [MCRA] claims raise the same question as would be asked in an unfair labor practice proceeding, namely, whether [his supervisors] placed plaintiff on less desirable work assignments, reduced his chances for overtime pay, and harassed him in retaliation for his union activities." Because the controversy which would be presented to a state court is identical to that which would be presented to the NLRB, there is a significant risk of state interference with the unfair labor practice of the NLRB. Under *Garmon* and *Sears, Roebuck*, Tamburello's MCRA claims are therefore preempted by the NLRA.

CONCLUSION

For the foregoing reasons, the judgment of the district court is ***affirmed***.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1295

VINCENT R. TAMBURELLO,

Plaintiff, Appellant,

v.

COMM-TRACT CORPORATION, JOHN F. POLMONARI, EDWARD MENDAR, AND STEVEN DICKIE,

Defendants, Appellees.

JUDGMENT

Entered: October 2, 1 995

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: **The judgment of the district court is affirmed.**

By The Court

s/ Francis P. Scigliano
Clerk

[cc: Messrs. Cobb & Van Dyck]

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED FEBRUARY 17, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 93-11946-Z

VINCENT R. TAMBURELLO

vs.

COMM-TRACT CORPORATION; JOHN F. POLMONARI; EDWARD MENARD; and STEVEN DICKIE

MEMORANDUM OF DECISION

February 17, 1995

ZOBEL, D.J.

Vincent Tamburello worked at Comm-Tract Corporation ("Comm-Tract") from April 1988 to May 10, 1993. During the course of his employment, he became a union steward with the Communications Workers of America ("the Union"). He claims that after he assumed this position, John Polmonari, Edward Menard and Steven Dickie — his supervisors at Comm-Tract — engaged in a course of harassment in retaliation for his union activities. Now, he seeks damages for alleged violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) (1988), breach of the collective-bargaining agreement between Comm-Tract and the Union ("CBA"), violations of the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12, § 11I (1988), and tortious interference with

contractual relations. Defendants have moved for dismissal of the First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).[1] For the reasons articulated below, their motion is granted.[2]

I. *Federal Labor Law Preemption*

Defendants argue that the primary jurisdiction of the National Labor Relations Board ("NLRB") precludes the RICO and state law claims. In the labor-management relations context, the NLRB has primary jurisdiction over matters arguably within the scope of sections 7 or 8 of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.* (1988) ("NLRA"). *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). State law claims are thus preempted if the controversy presented to the court is "identical to . . . that which could have been, but was not, presented to the labor board." *Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 197 (1978). Similarly, the *Garmon* doctrine requires that RICO liability can only rest on acts that are per se illegal independent of labor law. *See Brennan v. Chestnut*, 973 F.2d 644,

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1. Defendants initially moved to dismiss the original complaint. Plaintiff, in response, filed his First Amended Complaint and defendants renewed their motion to dismiss.

2. Defendants have submitted a fifty-five page memorandum in support of the motion to dismiss the original complaint, followed by a six-page supplemental memorandum to dismiss the First Amended Complaint and a sixteen-page reply memorandum. Although the first memorandum was accompanied by a motion for leave to file an excessive brief, the simultaneous filing of such a motion and the noncompliant brief does not accord with Local Rule 7.1. Furthermore, the briefs individually and collectively are replete with redundant and extraneous material. Plaintiff's submissions, although shorter, are objectionable for their crude and inappropriate language.

646 (8th Cir. 1992); *MHC, Inc. v. International Union, United Mine Workers of Am.*, 685 F. Supp. 1370, 1378 (E.D. Ky. 1988); *Butcher's Union, Local No. 498 v. SDC Inv., Inc.*, 631 F. Supp. 1001, 1009 (E.D. Cal. 1986).

A. *State Law Claims*

The state law issues raised under Counts 4 and 5 are identical to those an unfair labor practice proceeding would raise. According to the complaint, Polmonari, Menard and Dickie engaged in a course of harassment designed to punish plaintiff for his role in the Union. More specifically, they allegedly prevented him from getting extra lead pay by giving jobs as project leads to less experienced workers; they took him off projects on which he was likely to get overtime pay; they reassigned him to jobs that would require him to travel long distances; and they took away his company van.

Plaintiff asserts that the harassment infringed his constitutional and statutory rights to speak out freely about union matters, to associate with other union members, and to travel interstate. He further claims that by these actions, defendants interfered with his rights under the collective-bargaining agreement. Such conduct, plaintiff says, gives rise to his claims under Mass. Gen. L. ch. 12, § 11 (protecting federal and state constitutional and civil rights from both state and private action). This same conduct, though, falls squarely within the ambit of § 8(a)(3) of the NLRA, which prohibits employer discrimination on the basis of union status.[3] Plaintiff's claims raise the same

3. The acts of the individual defendants may be attributed to Comm-Tract. *See* 29 U.S.C. § 152(2) (1988). The individual defendants were agents of the company because they served in upper management roles (Polmonari was the president, Dickie the general manger, and Menard a manager), and indeed, according to the complaint, they controlled Comm-Tract's actions.

questions as would be asked in an unfair labor practice proceeding, namely, whether Polmonari, Menard and Dickie placed plaintiff on less desirable work assignments, reduced his chances for overtime pay, and harassed him in retaliation for his union activities. Accordingly, these state law claims are preempted.

B. *RICO Claims Against Polmonari, Menard, and Dickie*

Count 1 and 2 allege that defendants' actions amounted to a pattern of extortion to deprive plaintiff of his rights to speak out on union matters, his rights under the collective-bargaining agreement, and his right to his job. The complaint sets forth the requisite participation in an ongoing criminal enterprise and pattern of "predicate" acts, *United States v. Angiulo*, 847 F.2d 956, 964 (1st Cir. 1988), under the Hobbs Act, 18 U.S.C. § 1951 (1988) (prohibiting the taking of property by force, violence, or fear).

The NLRB's primary jurisdiction precludes these claims as well because plaintiff does not allege conduct that would be per se illegal independent of federal labor law. *See MHC*, 685 F. Supp. at 1378. In *MHC*, the court refused to dismiss RICO claims in a union-employer dispute because the acts involved — arson and destruction of property in the course of picketing — would constitute crimes in any context. The court explained: "If the activities alleged in a RICO claim involving a labor entity . . . would obviously be illegal under any and all circumstances . . . , the matter is not so tied to labor law as to make preemption necessary." *MHC*, 685 F. Supp. at 1378. Unlike the plaintiffs in *MHC*, plaintiff here does not allege activities that would be illegal under any and all circumstances. The alleged conduct that led to his termination of employment is illegal only by reference

to union activities. Accordingly, the RICO claims must be dismissed.[4]

II. *Breach of the Collective-Bargaining Agreement*

Plaintiff finally claims in the most general terms that Comm-Tract breached the CBA when it altered his work assignments in response to his position as a union steward and he seeks damages under § 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185 (1988). However, nowhere in the complaint does plaintiff refer to any particular provision of the collective-bargaining agreement that he claims was breached nor does he specify the nature of such breach. Therefore, the motion to dismiss is also granted with respect to this claim.

Conclusion

For the reasons discussed above, defendants' motion to dismiss plaintiff's First Amended Complaint (# 12) is granted.

February 17, 1995
DATE

s/ Ryan Zobel
DISTRICT JUDGE

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4. Because of this disposition, I need not address defendants' argument that plaintiff lacks standing to assert RICO claims against them.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 93-11946-Z

VINCENT R. TAMBURELLO

vs.

COMM-TRACT CORPORATION; JOHN F. POLMONARI; EDWARD MENARD; and STEVEN DICKIE

JUDGMENT

February 17, 1995

ZOBEL, D.J.

In accordance with the Memorandum of Decision, dated February 17, 1995, it is

ORDERED that judgment be and it is hereby entered for defendants, dismissing plaintiff's First Amended Complaint.

February 17, 1995
DATE

s/ Ryan W. Zobel
DISTRICT JUDGE

APPENDIX C — RELEVANT STATUTES

18 U.S.C. § 1961

§ 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce,

robbery, or extortion), section 1952 (relating to racketeering, section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2258 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), section 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of that title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act; . . . .

* * *

Appendix C

18 U.S.C. § 1962

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of any unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise, engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or

participate, directly by indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections[1] (a), (b), or (c) of this section.

(Added Pub. L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.)

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1. So in original. Probably should be "subsection".

Appendix C

18 U.S.C.A. § 1962

§ 1962. Prohibited activities

[See main volume for text of (a) to (c)]

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(As amended Pub. L. 100-690, Title VII, § 7033, Nov. 18, 1988, 102 Stat. 4398.)

Appendix C

29 U.S.C. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

Appendix C

29 U.S.C. § 158

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any another statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of

this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the

purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in

the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 150 of this title; *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize of bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such

employees whom such employer is required to recognize under this subchapter; *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or

bargain with labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such

picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty

days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the

provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

Appendix C

29 U.S.C.A. § 158

§ 158. Unfair labor practices

* * *

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

[See main volume for text of (1) to (3)]

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall

become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (a) or (B) of this

sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

* * *

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

(As amended July 26, 1974, Pub.L 93-360, § 1(c)-(e), 88 Stat. 395, 396.)

Appendix C

MASS General Laws, Chapter 12

§ 11H. Violations of constitutional rights; civil actions by attorney general; venue

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

Added by St.1979, c. 801, § 1, Amended by St.1982, c. 634, § 4.

§ 11*I*. Violations of constitutional rights; civil actions by aggrieved persons; costs and fees

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any

aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

Added by St.1979, c. 801, § 1.

Supreme Court, U.S.
FILED
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(2)

No. 95-1615

In The

Supreme Court of the United States

October Term, 1995

VINCENT R. TAMBURELLO,

Petitioner,

vs.

COMM-TRACT CORPORATION, JOHN F. POLMONARI, EDWARD MENARD and STEVEN DICKIE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the First Circuit was correct in affirming the District Court's dismissal of Petitioner's RICO claims as being preempted by the National Labor Relations Board's primary jurisdiction to adjudicate labor disputes, where Petitioner's claims were premised entirely on allegations of retaliation for Petitioner's activities as a union steward?

II. Whether the First Circuit was correct in affirming the District Court's dismissal of Petitioner's Massachusetts Civil Rights Act claim as being preempted by the National Labor Relations Board's primary jurisdiction to adjudicate labor disputes, where Petitioner's claim was premised entirely on allegations of retaliation for Petitioner's activities as a union steward?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Comm-Tract Corporation advises the Court that it has no parent company, no corporate subsidiaries and no affiliates.

PARTIES BELOW

The proceedings below were a civil action commenced by plaintiff Vincent R. Tamburello. Defendants below, and respondents here, are Comm-Tract Corporation, John F. Polmonari, Edward Menard and Steven Dickie.

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Tamburello v. Comm-Tract Corp., et al., 67 F.3d 973 (1st Cir. 1995).

STATEMENT OF JURISDICTION

(i) The Judgment of the United States Court of Appeals for the First Circuit which Petitioner seeks to have reviewed by this Court issued on October 2, 1995.

(ii) No rehearings were requested by Petitioner.

(iii) No cross-petitions for writ of certiorari have been filed.

(iv) Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article VI, § 2; 18 U.S.C. § 1961; 18 U.S.C. § 1962; 29 U.S.C. § 157; 29 U.S.C. § 158; Mass. Gen. Laws ch. 12, §§ 11H, 11I.

STATEMENT OF THE CASE

The Petitioner, Vincent R. Tamburello ("Tamburello"), was employed by Comm-Tract Corporation ("Comm-Tract") in Massachusetts from April, 1988 to May 10, 1993. He, like all members of his bargaining unit, was subject to the terms of a

collective bargaining agreement between Comm-Tract and the Communication Workers of America, AFL-CIO, Local 4340 (the "Union"). He became a union steward in July, 1991. Soon afterwards, three Comm-Tract officers, John F. Polmonari ("Polmonari"), Edward Menard ("Menard"), and Steven Dickie ("Dickie") (collectively, "Individual Defendants") allegedly began retaliating against Tamburello solely because of his union steward status. (*See* Appendix to Petition at 2a-3a, 17a).

Tamburello alleged that the Individual Defendants engaged in the following instances of retaliation: replacing Tamburello with less experienced workers, thereby preventing him from being eligible for extra lead pay; giving him menial job assignments; reassigning Tamburello to jobs requiring him to travel long distances; withholding Tamburello's personnel file from him; taking Tamburello off projects to deny him overtime pay; forcing Tamburello to take a vacation or face termination of his employment; taking his company vehicle away; and making anti-union statements and threats to him. Tamburello contended that such acts were designed to force him to resign from Comm-Tract. (*Id.* at 3a, 19a).

Tamburello did not file a grievance under the collective bargaining agreement until October, 1992 (after he had stepped down as union steward), nor did he complain to any Union official before then. At no time did he file a charge with the National Labor Relations Board ("NLRB") claiming an unfair labor practice had been committed against him. Tamburello resigned from Comm-Tract on May 10, 1993.

In September, 1993, Tamburello brought suit in the United States District Court for the District of Massachusetts asserting: (i) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c), (d) (1988) by the Individual Defendants, predicated upon alleged extortion

as defined in the Hobbs Act, 18 U.S.C. § 1951 (Counts I and II); (ii) a breach of the collective bargaining agreement by Comm-Tract premised upon 29 U.S.C. § 185 (1988), *i.e.*, § 301 of the Labor Management Relations Act ("LMRA")(Count III); a violation of the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11I (1988) (Count IV); and (iv) common law tortious interference with contractual relations (Count V). (*See* Appendix to Petition at 3a, 17a-18a). After an initial motion to dismiss for failure to state a claim was filed on behalf of all Defendants, Tamburello amended his complaint as of right on December 22, 1993. Thereafter, all Defendants again moved to dismiss.

The District Court granted Defendants' motion to dismiss in its entirety on February 17, 1995, dismissed the amended complaint, and entered judgment for Defendants on all counts. (*Id.* at 16a, 21a). The District Court concluded that the NLRB's primary jurisdiction over matters arguably within the scope of §§ 7 and 8 of the National Labor Relations Act ("NLRA") preempted Counts I, II, IV, and V of the amended complaint. (*Id.* at 18a-20a). With respect to Count III, the District Court held that Tamburello did not "refer to any particular provision of the collective bargaining agreement that he claims was breached nor [did] he specify the nature of such breach." (*Id.* at 21a).

On March 16, 1995, Tamburello filed a notice of appeal to the United States Court of Appeals for the First Circuit. He did not appeal the District Court's dismissal of Counts III and V of the Amended Complaint. (*Id.* at 3a n. 1). On October 2, 1995, after argument, the First Circuit issued a written opinion and affirmed the judgment of the District Court. (*Id.* at 15a).

REASONS FOR DENYING THE WRIT

I.

REVIEW OF QUESTION I IS INAPPROPRIATE, GIVEN THE ABSENCE OF A SIGNIFICANT CONFLICT AMONG THE FEDERAL COURTS CREATED BY THE FIRST CIRCUIT'S DECISION.

The decision of the Court of Appeals with respect to Counts I and II of Tamburello's Amended Complaint (*i.e.*, Question I) does not warrant review by this Court. The First Circuit held that Tamburello's RICO claims were preempted by the NLRB's primary jurisdiction over arguable unfair labor practices ("*Garmon* preemption"). (*See* Appendix to Petition at 4a - 13a).

In so holding, the First Circuit applied principles set forth in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and its progeny. *See, e.g., Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 276 (1971); *Vaca v. Sipes*, 386 U.S. 171, 179-180 (1967). The *Garmon* Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245. (*See* Appendix to Petition at 4a). The First Circuit agreed with the District Court that Tamburello's allegations, if true, would constitute unfair labor practices prohibited by the NLRA. (*Id.* at 6a). Accordingly, Tamburello's RICO claims were properly dismissed in accordance with *Garmon* preemption. (*Id.* at 10a).

The First Circuit described three "generally recognized exceptions to the NLRB's primary jurisdiction," and concluded that Tamburello's RICO claims came within none of them. (*Id.* at

6a - 7a). The first exception is "where Congress has expressly carved out an exception to the NLRB's primary jurisdiction." (*Id.* at 6a). As the First Circuit noted, Congress did *not* carve out any such exception with respect to Hobbs Act extortion, as alleged by Tamburello. To the contrary, "the only labor-related 'racketeering' activity expressly listed as predicates to liability under RICO are actions concerning restrictions of payments and loans to labor organizations, or those relating to embezzlement from labor funds." (*Id.*) (*citing* 18 U.S.C. § 1961(1)(C); 29 U.S.C. §§ 185, 501(c)). The second exception, when regulated activity is grounded in "interests so deeply rooted in local feeling" that the states are not deprived of the ability to act, did not apply to Tamburello's RICO claims, because it does not concern itself with the relationship between two federal laws (*i.e.*, RICO and the NLRA) (*Id.* at 7a). Tamburello does not take issue with the First Circuit's formulation or application of this exception.

The third exception "holds that the NLRB's exclusive jurisdiction does not apply if the regulated activity is merely a peripheral or collateral concern of the labor laws." (*Id.*). This exception was explained by this Court in *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 626 (1975) ("[T]he federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies[.]"). Here, the First Circuit determined that "the unfair labor practice issues implicated by Tamburello's complaint are not merely collateral to his RICO claims"; accordingly, the First Circuit concluded that this exception did not apply. (Appendix to Petition at 9a) (footnote omitted).

Tamburello contends that this Court "has never squarely addressed" the issue created by the third exception, "namely whether RICO, a federal criminal statute with an express civil remedy, can be gutted by another federal statute, the NLRA[.]"

(Petition at 4-5). Tamburello is incorrect. This Court addressed the relationship between the NLRA and other federal laws regulating labor-related activities in *Connell*. The *Connell* doctrine has been applied by this Court in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 85 (1982), and by numerous lower federal courts. Further, there is no significant difference among the federal courts in assessing the particular relationship between RICO and the NLRA requiring this Court's attention.

As the First Circuit accurately stated, "several federal courts take the position that courts must defer to the primary jurisdiction of the NLRB if the underlying conduct of the RICO claim is wrongful only by virtue of, or reference to, the labor laws." (Appendix to Petition at 7a - 8a). *See, e.g., Brennan v. Chestnut*, 973 F.2d 644, 646 (8th Cir. 1992); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 651, 662 (7th Cir. 1992); *Mann v. Air Line Pilots Assoc.*, 848 F. Supp. 990, 993 (S.D. Fla. 1994); *McDonough v. Gencorp, Inc.*, 750 F. Supp. 368, 370 (S.D. Ill. 1990); *MHC, Inc. v. International Union, United Mine Workers of Am.*, 685 F. Supp. 1370, 1378 (E.D. Ky. 1988); *Brown v. Keystone Consol. Indus., Inc.*, 680 F. Supp. 1212, 1224-1225 (N.D. Ill. 1988); *Butchers' Union, Local No. 498 v. SDC Inv. Inc.*, 631 F. Supp. 1001, 1011 (E.D. Cal. 1986). *See also Hood v. Smith Transfer Corp.*, 762 F. Supp. 1274, 1287 (W.D. Ky. 1991)(noting that "any jurisdictional conflict between the NLRA and RICO is merely illusory."). These courts consistently took this position regardless of whether they concluded, on the facts before them, that preemption was appropriate.

Further, the cases Tamburello himself relies upon are not at all inconsistent with this position given the facts confronting those courts. In *United States v. Boffa*, 688 F.2d 919, 923-924 (3rd. Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983), the RICO predicate acts included obstruction of justice, and mail fraud in a scheme to secure higher profits. In *United States v. Thordarson*,

646 F.2d 1323, 1325 (9th Cir. 1981), the RICO predicate acts included the use of explosives to damage vehicles during a strike, and arson.[1] Such acts are wrongful without reference to federal labor law, unlike those acts which Tamburello alleged were committed by the Individual Defendants. (*See* Appendix to Petition at 9a-10a.). *See also Talbot*, 961 F.2d at 662 (distinguishing *Boffa* on such grounds).

Tamburello also asserts that the First Circuit's decision dismissing his RICO counts as preempted by the NLRB's primary jurisdiction is in error because "the constitutional doctrine of preemption obviously deals with federal/state conflicts rather than with federal/federal conflicts of applicable law." (Petition at 5). This argument deserves little attention. In describing the relationship between RICO and the NLRA, the First Circuit used the term, "preemption." (*See* Appendix to Petition at 5a). This nomenclature is consistent with that used by most other federal courts that have considered the issue. *See, e.g., Talbot*, 961 F.2d at 659. Indeed, this Court has referred to the primary jurisdiction of the NLRB as "preemp[ting] state *and federal* jurisdiction to remedy conduct that is arguably protected or prohibited by the [NLRA]." *Lockridge*, 403 U.S. at 276. (emphasis added). Quite simply, as the First Circuit recognized, the *Garmon* doctrine of NLRB primary jurisdiction which "was originally concerned only with federal supremacy over conflicting *state* laws . . . has been extended to cover the relationship between the NLRA and other federal statutes." (Appendix to Petition at 5a n. 2) (*citing Connell, supra*) (emphasis in original).

Tamburello's other argument regarding Question I also is without merit. Tamburello asserts that "when a breach of the

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1. They also included conversion of union funds in violation of 29 U.S.C. § 501(c) which was one of the two labor-related "racketeering" activities expressly listed as a predicate to RICO liability. *See* 18 U.S.C. § 1961(1)(C).

Union's Duty of Fair Representation ["DFR"] is alleged . . . resort to the federal courts in such instances is proper and the NLRA therefore is no impediment to the same." (Petition at 6) (*citing Breininger v. Sheet Metal Workers Int'l Assoc., Local Union No. 6*, 493 U.S. 67 (1989) and *Vaca, supra*). Tamburello, however, did not appeal the District Court's dismissal of Count III of the Amended Complaint. (*See* Appendix to Petition at 3a n. 1). Accordingly, he "ha[d] no viable duty of fair representation claim before the [Court of Appeals.]" *(Id.* at 13a). Further, Tamburello's RICO counts were not "hybrid" breach of contract/ breach of DFR claims brought under § 301 of the LMRA. To the extent that *Breininger* and *Vaca* furnish an exception to *Garmon* preemption, it is only with respect to such claims. (*Id.*).

The Court of Appeals' decision affirming the dismissal of Tamburello's RICO counts is sound. Congress, through the passage of the NLRA, sought to "create a uniform, nationwide body of labor law interpreted by a centralized expert agency — the [NLRB]." (Appendix to Petition at 5a). Over several decades, this Court has crafted a broad doctrine of NLRB primary jurisdiction over labor controversies, making it clear that artful pleading cannot displace the NLRB's function in settling labor disputes. *See, e.g., Lockridge*, 403 U.S. at 292 ("It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern"). If theories such as Tamburello's RICO counts are permitted to elude NLRB preemption, the NLRB's role as chief arbiter of labor disputes will be severely compromised; "there are few unfair labor practices which could not be similarly repackaged." *Chaulk v. MCAD*, 70 F.3d 1361, 1370 (1st Cir. 1995). This would create a "system of labor dispute adjudication parallel to the NLRB . . . leaving the state and federal courts to grapple piecemeal with issues Congress intended primarily for NLRB resolution." *Id.* Accordingly, the First Circuit's decision below does not require review by this Court.

II.

IN VIEW OF THE FIRST CIRCUIT'S CORRECT APPLICATION OF SETTLED PRINCIPLES OF LAW, REVIEW OF QUESTION II IS UNWARRANTED.

The First Circuit's decision with respect to Count IV of Tamburello's Amended Complaint (*i.e.*, Question II) likewise does not call for review by this Court. The First Circuit held that *Garmon* preemption required dismissal of Tamburello's Massachusetts Civil Rights Act claim. (*See* Appendix to Petition at 13a - 15a). In so holding, it agreed with the District Court that Respondents' alleged conduct did not fall within the "local interests" exception to *Garmon* preemption. One of the prerequisites of this exception is that "the controversy presented to the state court" be different from "that which could have been, but was not, presented to the [NLRB]." *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 197 (1978). The First Circuit noted that the controversy raised by Tamburello's Massachusetts Civil Rights Act claim was "identical" to that which would be heard by the NLRB. (*See* Appendix to Petition at 15a). Accordingly, it relied upon *Garmon* and *Sears, Roebuck* in concluding that preemption was appropriate. (*Id.*).

The First Circuit's decision is correct and does not warrant review by this Court. In his Petition, Tamburello asserts that it "is in conflict with applicable decisions of this Court," although he cites no such decisions. (Petition at 6). This is not surprising. The *Garmon* preemption doctrine is well-settled law, and the First Circuit properly applied *Sears, Roebuck* to Tamburello's claim under the state civil rights statute. *See, e.g., Belknap v. Hale*, 463 U.S. 491, 510 (1983) (citing *Sears* with approval); *Local 926,*

IUOE, AFL-CIO v. Jones, 460 U.S. 669, 681 (1983) (same).[2]

Tamburello confuses *Garmon* preemption with preemption of state-law actions by § 301 of the LMRA. In this regard, Tamburello asserts that his claim "could be resolved without resort to interpretation of the Collective Bargaining Agreement." (Petition at 7). Apparently, he makes such an assertion because this Court has held that if a "state-law claim can be resolved without interpreting the [collective bargaining] agreement itself," it is not preempted by § 301. *Lingle v. Magic Chef, Norge Div.*, 486 U.S. 399, 409-410 (1988). This has nothing to do with *Garmon* preemption, *i.e.*, diminishing "significant risk of state interference with the unfair labor practice [jurisdiction] of the NLRB." (Appendix to Petition at 15a). Section 301 preempts state-law claims involving "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations," *i.e.*, the interpretation and enforcement of collective bargaining agreements. However, Tamburello's claim under Mass. Gen. Laws ch. 12 §11I was not to enforce rights arising under the collective bargaining agreement; it was to obtain a statutory

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2. Tamburello further asserts that the First Circuit's decision affirming the dismissal of Count IV of the Amended Complaint is in error because "a breach of the Union's DRF [*sic*] was properly alleged." (Petition at 7). This is irrelevant to the instant consideration of *Garmon* preemption. The duty of fair representation inheres in a union; a breach of such duty is a predicate to employer liability only in a breach of contract action arising under § 301 of the LMRA. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 185-193 (1967). Tamburello's Massachusetts Civil Rights Act claim was not such an action.

remedy akin to that available under 42 U.S.C. § 1983 (1988).[3] Accordingly, the scope of § 301 preemption is irrelevant to dismissal of Count IV of Tamburello's Amended Complaint.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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3. Tamburello characterizes the Massachusetts Civil Rights Act as "in essence a state version of the Hobbs Act, but with an express civil remedy." (Petition at 6). This ignores what the Massachusetts courts and the federal courts construing the Massachusetts Civil Rights Act have said with respect to the statute's purpose. *See, e.g., Thierren v. Hamilton*, 849 F. Supp. 110, 115 (D. Mass. 1994) ("[t]he Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11I, and 42 U.S.C. § 1983 are parallel statutes."); *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 822-23, 473 N.E.2d 1128, 1131 (1985). Regardless, it is clear that the statute is not intended to vindicate rights grounded in contract, as Tamburello implicitly acknowledges.